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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

DIE AND TOOLMAKERS LODGE 113
INTERNATIONAL ASSOCIATION OF MACHINISTS
(AFL-CIO), *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PLATO E. PAPPS
GEO. W. CHRISTENSEN
1300 Connecticut Avenue, N. W.
Washington 6, D. C.
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on May 9, 1956.

OPINIONS BELOW

The National Labor Relations Board's opinion is reported in the Official Reports of that agency and appears at 111 NLRB 853. The United States Seventh Circuit Court of Appeals' opinion is reported at 231 F. 2d 298. (Appendix A and Appendix B, *infra.*)

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1) and 29 U.S.C. § 160 (e). (Appendix C, *infra.*) The opinion of the Court of Appeals issued on March 6, 1956. Rehearing was denied on April 19, 1956. The Court's final decree was entered May 9, 1956.

QUESTIONS PRESENTED

1. As a question of law and statutory construction, where it is undisputed that a union invoked a valid union security clause to cause an employer to discharge an employee whose union membership was automatically terminated by non-tender of dues, has any violation of Section 8(b)(2) of the Act occurred?

2. As a matter of law, are the Board's and Court's findings of fact and conclusions of law defective when there is a material variance between the complaint and the proof and part of the evidence relied upon concerns conduct pre-dating the charge by more than six months?

STATUTES INVOLVED

The statutory provisions involved are Sections 8(a)(3), 8(b)(1)(A), 8(b)(2) and 10(b)(c) and (e) of the National Labor Relations Act, as amended, (29 U.S.C. 158(a)(3), 158(b)(1)(A), 158(b)(2), 160(b)(c) and (e)) and Section 10(e) of the Administrative Procedures Act (5 U.S.C. 1009(e)).

These provisions are reproduced in Appendix C *infra.*

STATEMENT

The facts material to consideration of the questions presented in this case relate primarily to the interpre-

tation and application of Sections 8(b)(2) and 10(b) of the National Labor Relations Act, as amended.

1. It is undisputed that, pursuant to a valid[1] union-security agreement between the Petitioner and Peerless Tool and Engineering Co. (hereafter called Peerless) (R. 28), Petitioner sought and secured the discharge of Peerless employees Salisbury, Pieha and Bellendir.[2] (R. 40) It is likewise undisputed that the membership of these three employees in Petitioner Union had terminated during the term of such agreement because of their failure to tender the dues uniformly required as a condition of retaining membership.[3]

However, the Board ruled that these three employees were discharged in violation of Section 8(b)(2) of the Act because any tender of such dues, if made, would have been futile (R. 382, Appendix 5a). The Board based its ruling on a finding that the Union had a policy of not accepting dues without an accompanying donation to the Union's strike fund (R. 380, Appendix 4a).

2. In Paragraph 8(a) of the Complaint, Petitioner was charged with having violated Section 8(b)(1)(A) of the Act by F. M. Wilkie, its business representative, and Anthony Chmielak, its steward, having threatened employees that the Union would refuse to represent

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[1] The Board's General Counsel conceded the validity of the agreement under the first Proviso to Section 8(a)(3) of the Act. (R. 361, footnote 15)

[2] Two additional dischargees, Hall and Taylor, involved in the earlier stages of this proceeding, are not involved in the questions whose review is sought.

[3] The Board so conceded. (R. 379, 380; Appendix 3a)

them in processing grievances against Peerless if said employees *failed or refused to pay assessments* to the Union (R. 16).

By motion during the course of the hearing, Frank Wilkie's name was stricken (R. 81). Proof of this alleged violation was limited to such threat allegedly having occurred *after October 15, 1953 and before October 31, 1953,* because the General Counsel limited the alleged utterance of the alleged threat to June, August, September and October, 1953 (R. 24), and Section 10(b) of the Act (Appendix 25a) precluded the Board from predicating a finding of violation of the Act on utterances made more than six months prior to the April 15, 1954 issuance of the charge on which Paragraph 8(a) of the Complaint was based (R. 9-10).

The Board found that Steward Chmielak "at least during October and November, 1953" (R. 382, footnote 6; Appendix 6a), uttered the following threat: "He [Chmielak] said they [the Union] would not look into any of my grievances *unless I could show my book showing I had a paid up membership"* (R. 177) (Emphasis added).

The lower court relied on Cerminn's testimony that the Union threatened him on June 10, 1953, that it would not handle his grievances unless he paid an assessment (donation) into the Union strike fund *and* his testimony that the Union threatened him in October, 1953, that it would not handle his grievances if he wasn't a paid-up member of the Union, to establish the 8(b)(1)(A) violation charged in Paragraph 8(a) of the Complaint (Appendix 16a).

3. As to 1 above, the lower court limited its review to the question of whether the Board's 'futility' finding

was supported by substantial evidence (Appendix 13a), ignoring the legal questions in the case concerning the Board's construction and application of Section 8(b)(2) of the Act.

As to 2 above, the lower court limited its review to the question of whether the Board's finding of violation of Section 8(b)(1)(A) of the Act was supported by substantial evidence (Appendix 17a), ignoring the legal questions in the case concerning variance between the conduct alleged in the Complaint as violative of the Act and the evidence relied on as establishing the claimed violation, and the application of Section 10(b) of the Act.

The lower court denied Petitioner's timely filed Petition for Rehearing on April 19, 1956 and issued its final decree enforcing the Board's order on May 9, 1956.

REASONS FOR GRANTING THE WRIT

1. This case concerns important legal questions involving the construction and application of a federal statute affecting the orderly administration of collective bargaining agreements and the internal affairs and laws of labor organizations, which have not yet been settled by this Court.

a. Section 8(b)(2)

(1) Section 8(b)(2) of the Act (Appendix 25a) makes it an unfair labor practice for a union to cause an employer to discharge one of his employees under a Union Security Agreement of the type authorized by the first proviso of Section 8(a)(3) of the Act (Appendix 24a), where the dischargee's *union membership* was terminated on some ground other than his failure to tender the periodic dues required as a condition of retaining his membership.

It is clear under this language, *that where it is undisputed a dischargee's union membership has been terminated by his failure to tender dues,* and that his discharge is subsequently requested under a valid union-security clause for the non-membership so caused, no violation of Section 8(b)(2) occurs.

The rule is well established that a clear and unambiguous statutory provision, such as this, cannot be amended by administrative interpretation and application, to fit the notions of the Administrator of desirable policy under the Act. (*Colgate-Palmolive-Peet Co.* v. *NLRB,* 338 U.S. 355, 362-364; *Social Security Board* v. *Nierotko,* 327 U.S. 358, 369, 370; *Koshland* v. *Helvering,* 298 U.S. 441, 447; *Addison* v. *Holly Hill Fruit Co.,* 322 U.S. 607, 617, 618; *Regents of the University System of Ga.* v. *Carroll,* 338 U.S. 586, 601-3; *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission,* 291 U.S. 587, 598.)

As this court stated in *Colgate-Palmolive-Peet Co.* v. *NLRB,* 338 U.S. 355, at 362-363:

> "The claimed impotency of the [union security] contract as a defense here rests *not upon any provision of the Act of Congress or of state law but upon a policy declared by the Board* . . . Congress knew that a closed shop would . . . lead inevitably to discrimination in tenure of employment. Nevertheless . . . Congress inserted the Proviso of 8(3) . . . That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act . . . *To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress* . . ."
> (emphasis added)

Yet what the Board has done here, with the lower court's approval, is to administratively modify or amend Section 8(b)(2) of the Act, to conform to its notions of desirable administration of union-security agreements.

As pointed out in the Statement, the Board admitted it was undisputed that the union memberships of Salisbury, Picha and Bellendir were automatically terminated in accordance with the Union's laws, by their failure to pay dues to the Union, that such termination occurred at a time they were subject to a valid Company-Union agreement conditioning their continued employment on the retention of Union membership over the life of that agreement, and that the Union's subsequent request for their discharge was specifically predicated on their non-membership due to such non-tender of dues. With those concessions, the Board had only one course of action open—dismissal of the Complaint.

But the Board, to use its own words, stated instead that: "The failure of Salisbury, Picha and Bellendir to tender dues during their respective three-month grace periods is immaterial" (R. 382; Appendix 6a). (To the question of whether Section 8(b)(2) was violated.)

This finding of the Board (and the lower court) removes the words "reasons other than" from Section 8(a)(3)(B) and the words "some ground other than" from Section 8(b)(2) of the Act (Appendix 25a). And these are the key words which give these statutory provisions meaning, which provide statutory basis for invalidation of union security agreements! By

such 'judicial amendment' the Board and lower court stretched the statute beyond any recognizable limit, by administrative construction of Section 8(b)(2), to accomplish a purpose Congress did not contemplate or authorize, namely, the invalidation of a union-security agreement where the loss of union membership resulted from non-tender of dues.

However ambitious the Board may be to avoid the impact of union security agreements on employees (for example, see *Colgate-Palmolive-Peet Co.* v. *NLRB,* 338 U.S. 355) or to otherwise alter Congressional policy set forth in the statute (cf. *NLRB* v. *Highland Park Mfg. Co.,* 341 U.S. 321), the place to address its desires to establish such policy change is Congress, not by administrative amendment of the Statute.

It is plain that the Board has sought to escape from the requirements of the clear and unambiguous language of Section 8(b)(2) of the National Labor Relations Act, as amended, by writing an exception into the section which it does not contain, or authorize, or permit. *This it cannot do except by Act of Congress.*

Prior to the changes beginning in 1953 in the composition of the Board's membership, several *former* members of the Board construed Section 8(b)(2) of the Act in accordance with its plain provisions. In the case of *Al Massera, Inc.,* 101 NLRB 837, in footnote 8 on pages 839, 840, former Board members Houston and Styles are quoted as follows:

> "Members Houston and Styles would not find a violation by these Respondent Employers, even

absent any investigation by them as to the Union's reason for requesting the discharges. *The employees were not members in good standing because of* either *nonpayment of dues* or failure to make proper application for membership. Each was thus vulnerable to discharge because of his own improper conduct. *The Act gives the Union an absolute right in these circumstances to request their discharge.* Congress intended to eliminate 'free riders' under a valid union-security provision such as existed in this case, and permitted the ultimate sanction of discharge to prevent employees from 'taking a free ride.' The Congressional Record and the various committee reports on the amendments to the Act are replete with references that emphasize a man's right to remain at work in a union shop *only so long as he pays his union dues,* no matter how reprehensible to the union his conduct in other respects might be.

"In this case, the Employer in each instance, when confronted by a request that gave him 'reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues . . .,'" acted at his peril. In his own interest and to save himself from validating the statute in the event that the belief engendered by the letter should turn out to be the fact, he would have been prudent to investigate. But a failure to investigate, although risky, *clearly would not entail a violation if in fact, as is the case here, nonpayment of dues alone caused the employees' loss of membership in the Union.* The statute does not penalize an employer's failure to investigate, nor does it save an employer from a violation, merely because he does investigate. Having some grounds for believing that nonpayment of dues was not the reason for an employee's loss of membership in a Union, an employer would still not be guilty of a dis-

criminatory discharge if the union's real reason for the expulsion was nonpayment of dues.

"*As for the Respondent Union, the language of Section 8(b)(2) itself precludes a finding that it violated that section.* In pertinent part, 8(b)(2) proscribes causing an employer to discriminate against an employee with respect to whom 'membership' has been denied or terminated on some ground other than his failure to tender periodic dues or initiation fees. There is no showing in this case that the *membership* of Brubaker, Brookover, or Papangellin was denied or terminated (by the Union) for any reason other than their failure to tender timely dues and initiation fees. *Whatever motivation the Union may have had for thereafter requesting their discharge is not relevant in determining whether or not it violated the Act.*

"For these reasons, Members Houston and Styles would dismiss the complaint insofar as it alleges violations with respect to Brubaker, Brookover, and Papangellin, even apart from the ground expressed in the body of this decision, as to which they concur with Member Peterson." (Emphasis supplied)

This construction of Section 8(b)(2) obviously is in accord with the plain provisions of the statute.

(2) It was the duty of the court below to review and set aside the Board's misapplication of the Statute to the conceded and undisputed facts set forth above (*NLRB* v. *Highland Park Mfg. Co.*, 341 U.S. 321, 325, 326; *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369, 370; *Brannan* v. *Stark*, 342 U.S. 451, 465-6; *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 76 S. Ct. 574, 577; *Securities & Exchange Commission* v. *Central Ill. Corp.*, 338 U.S. 96, 128-9).

But the court ignored the questionable legality of the Board's order and accepted the Board's contention that it had merely determined questions of fact, as to which its determinations were conclusive, so long as supported by substantial evidence, and that only factual questions were before the court—avoiding the obvious question of whether its findings and conclusions were within the boundaries of the Statute and whether its determinations of questions of law were supportable.

Both Congress and this Court have declared that the court reviewing an agency action has the function of determining questions: (1) of law, (2) of the interpretation and application of federal statutes; (3) of the meaning and application of the terms of an agency action; and (4) of whether an agency has exceeded its statutory limits or authority, or acted outside of its statutory authority (Section 10(e), Admin. Procedure Act, 5 U.S.C. 1009(e); *NLRB* v. *Highland Park Mfg. Co.*, 341 U.S. 321, 326; *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369; *Brannan* v. *Stark*, 342 U.S. 451, 465-466; *E. Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 76 S. Ct. 574, 577). Both this Court and other courts below have declared the scope of judicial review of orders of the National Labor Relations Board issued under Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e); Appendix 27a) is the same as that established by Section 10(e) of the Admin. Proc. Act. (5 U.S.C. 1009(e); (Appendix 23a) (*Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487; *NLRB* v. *Minn. Mining & Mfg. Co.*, 179 F. 2d 323, 326)

We believe the court below was remiss in exercise of its review function, in not determining the serious

questions of law, statutory interpretation and application, meaning of the agency action, and statutory limitation and authority, set forth above.

(3) Congress is ordinarily presumed to have intended the words of a statute to have their usual and ordinary meaning (2 Sutherland, Statutes and Statutory Construction, 3rd Ed., p. 437; *NLRB* v. *Coca Cola Bottling Co.,* 76 S. Ct. 383, 386; *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607, 618; *Old Colony R. Co.* v. *Comm.,* 284 U.S. 552).

In Section 8(b)(2) of the Act, Congress declared that a union violated Section 8(b)(2) of the Act only when it caused the discharge of an employee under a union-security agreement *whose union membership had been terminated for some other reason than non-payment of dues.* It is thus clear that Congress did *not* intend to invalidate discharges under a union-security agreement where it is not disputed that the union did not cause the dischargee's union membership to terminate for any reason other than non-payment of dues, however much the Board might wish it to be otherwise.

In fact, this is just the type of discharge "for cause" in which the Board is precluded from ordering reinstatement with back pay of the dischargee (Section 10(c) NLRA, 29 U.S.C. Sec. 160(c), Appendix 27a).

As Justice Reed stated in the case of *Social Security Board* v. *Nierotko,* 327 U.S. 358, at pages 369, 370:

> "Administration, when it interprets a statute so as to make it apply to particular circumstances, acts as a delegate to the legislative power. Congress might have declared that 'back pay'

awards under the Labor Act should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid to employees by employers should be treated as wages . . . Congress did neither. An Agency may not finally decide the limits of its statutory power. That is a judicial function . . . We conclude . . . that the Board's interpretation of this Statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits . . . It is beyond the permissible limits of administrative interpretation."

In the above case, the Social Security Board had interpreted the word "wages" as used in the Social Security Act as not to include back pay awards granted by the National Labor Relations Board. The Court found as a matter of law that the Social Security Board had exceeded its statutory powers. Justice Frankfurter, in his concurring opinion, succinctly stated the rule as follows:

> "It is a plain disregard of the law for the Social Security Board not to include such payments (back pay awards) among the employees' wages. Neither the terms of the Social Security Act . . . nor the implicatons of policy . . . give the Board judicially unreviewable authority to exclude from wages *what as a matter of law are wages.*" (Emphasis supplied)

The Petitioner submits that the question of the effect to be given the language of Section 8(b)(2) is of great importance in the administration of the statute, particularly in view of its impact on union-security agreements and the provisions of union constitutions governing termination of membership; that the statutory language has been erroneously applied

in this case to achieve a purpose not contemplated by the statute; and that this is a question which has not yet been, but should be, finally resolved by this Court.

b. Section 8(b)(1)(A)

(1) The Board's General Counsel charged the Union in Paragraph 8(a) of the Complaint with having violated Section 8(b)(1)(A) of the Act (Appendix 25a) by its Steward Chmielak, in that Chmielak told undesignated Peerless employees in June, August, September and October, 1953, that the Union would not process their grievances unless they paid assessments (or donations) into the Union's Strike Fund. The Board relied on testimony by one employee, Cerminn, to the effect that, sometime in October or November, 1953, Chmielak told Cerminn he would not process Cerminn's grievances *if he didn't have a paid-up dues status in the Union* (good standing membership), to substantiate its finding of the violation of 8(b)(1)(A), as charged in Paragraph 8(a) of the Complaint.

The Board thus avoided the 10(b) limitations problem raised by the Union by this finding. (See footnote 6, R. 382, Appendix 6a).

The Union urged dismissal of this finding of violation of Section 8(b)(1)(A), however, on the ground there was a fatal varance between the conduct charged as constituting the alleged violation in Paragraph 8(a) of the Complaint and this proof advanced by the Board in support thereof, maintaining that, as a question of law, such variance was fatal to the Complaint, since the Boards General Counsel did not amend his Complaint to specify the materially different alleged October threat to be violative of Sec.

8(b)(1)(A). The lower court, however, relied on both a June 10 and the October threat to substantiate the Board's finding of violation of Sec. 8(b)(1)(A) charged in Paragraph 8(a) of the Complaint **(Appendix 17a).**

The courts charged with the review of orders of administrative agencies have consistently held a material variance between Complaint and Proof to be sufficient ground for denial of enforcement of the agency order (*NLRB* v. *Sands Mfg. Co.*, 306 U.S. 332, 346; *NLRB* v. *Consol. Edison Co.*, 305 U.S. 197, 234, 235; *NLRB* v. *IBS Mfg. Co.*, 210 F. 2d 634, 637; *Schneiderman* v. *U. S.*, 320 U.S. 118, 159, 160; *NLRB* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149, 150; *FTC* v. *Standard Brands*, 189 F. 2d 510, 512, 513; *NLRB* v. *Fulton Bag Co.*, 175 F. 2d 675, 677). And Section 10(b) of the Act bars reliance on acts occurring more than six months prior to the charge (29 U.S.C. 160(b)).

June 10 was the only time the threat set forth in the Complaint was voiced by Chmielak; the threat voiced in October was an entirely different one. Section 10(b) precludes reliance upon the June 10 threat to establish violation of Section 8(b)(1)(A) as alleged; and the line of cases cited above preclude reliance upon the October threat to establish violation of Section 8(b)(1)(A) as alleged.

The Petitioner submits that this is an important question of law and the construction and application of Section 10(b) of the Act, which should be finally resolved by this Court.

2. Assuming arguendo that the Board and the court below might apply a "futility of tender" doctrine in this case, the application of this doctrine by the court below is believed to be in conflict with the decision of the Second Circuit in NLRB v. Department Store Union, 216 F. 2d 285.

In that case, an employee subject to a valid Union security agreement failed to pay current dues to the Union, on his self-belief the Union would refuse to accept them, because the Union had refused to accept dues tenders from him in the past, without an accompanying fine payment. The Union sought and secured his discharge. The Board held the Union's conduct violative of Section 8(b)(2) in that, had the employee tendered current dues to the Union, to retain Union membership, the Union would have refused the tender without an accompanying fine payment. The court set aside the Board's order, holding as a matter of law that, where the employee had failed to tender current dues *to test the question of whether the Union would have refused his tender unless he accompanied the dues tender with a fine payment,* the Board's speculative assumption that it would have been refused could not support its order.

In similar fashion here, the Board held the Union violated Section 8(b)(2) of the Act by causing the discharge of employees Salisbury, Picha and Bellendir for their having permitted their Union membership to terminate by non-payment of dues during a period they were subject to a valid Union security agreement, on the basis of a finding such tender would have been refused if made. Here, too, the Board held that, had these employees made a timely tender of dues to the Union to avoid such termination, it would have been refused without an accompanying donation to the Union Strike Fund. And similarly, *these*

employees failed to test this speculative assumption. In this case, however, the Circuit Court ordered enforcement of the Board order. Thus there still remains a conflict between the circuits, on the legal question of whether an employee who alleges himself to be of the opinion his tender of dues if made would be refused shall be required to test such belief before the Board may find "futility", and order reinstatement, which question should be resolved by this Court.

3. Assuming arguendo that the Board and court might apply a "futility of tender" doctrine in this case, their application of the doctrine, as a question of law, is believed to be contrary to, and in conflict with, prevailing legal authority, including that of this court.

The Board and Court relied upon the existence of an alleged Union "policy" to refuse dues tenders without an accompanying donation to the Union Strike Fund, to excuse Salisbury's non-tender of dues to the Union for the months of April, May and June, 1953. They reasoned that, had Salisbury made a tender of dues to the Union during that three-month grace period, to avoid termination of his membership, the Union would have refused it, and went on to find that this rendered such tender "futile", thus excusing him from application of the Section 8(b)(2) statutory requirement. To similar effect, Picha and Bellendir.

The Seventh Circuit, however, has itself ruled that the general law of tender should be applied to situations like these. (*NLRB* v. *Aluminum Workers*, 230 F. 2d 515, 518). And the general law of tender requires: (1) *an affirmative and timely tender* by the obligor to the obligee, and (2) *an affirmative rejection* by the obligee of such tender, before tender may be held to be futile (86 C.J.S. Tender, § 1, last paragraph;

3 Williston on Contracts, Rev. Ed., Tender, Paragraph 69(A), p. 2008; *Mobley* v. *New York Life Ins. Co.*, 295 U.S. 632; *Pfaff* v. *Petrie*, 396 Ill. 44, 56; *Supreme Tent, Knights of Maccabees* v. *Fisher*, 45 Ind. App. 419; *St. George's Society* v. *Sawyer*, 204 Ia. 103). The Second Circuit appears to follow this line of authority (*NLRB* v. *Dept. Store Union*, 216 F. 2d 285).

The Court below relied on *NLRB* v. *Int. Assn. Machinists*, 203 F. 2d 173 (Appendix 14a), as its authority. This is simply begging the question involved here, since in that case *the Union had affirmatively rejected a tender, had terminated the employee's Union membership for dual unionism, and was precluded by its own laws from accepting any dues tender from him without payment of a $500 fine.*

This case involves an entirely different question, since it is undisputed here that *the Union memberships of the involved employees were terminated for non-payment of dues by automatic application of the Union's laws.*

The fact that the Board successfully persuaded the Ninth Circuit to apply its "futility of tender" doctrine in the case relied upon by the lower court does not warrant the application to all subsequent ones, including this one, where the facts differ so materially and in view of the fact the case the Board relied upon in the Ninth Circuit (*Mayne's case*, 5 Coke 20 b), is not in line with more modern authority.

An examination and final determination of the proper application of the doctrine of "futility of tender" to 8(b)(2) cases, in the event it has any applicability under the undisputed facts of this case, should be made by this Court.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

PLATO E. PAPPS
GEO. W. CHRISTENSEN
1300 Connecticut Avenue, N. W.
Washington 6, D. C.
Counsel for Petitioner

APPENDIX A

PEERLESS TOOL AND ENGINEERING CO. and
MARLIN TAYLOR AND LOWELL HALL
DIE AND TOOL MAKERS LODGE NO. 113, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL and MARLIN TAYLOR and LOWELL HALL. Cases Nos. 13-CA-1661 and 13-CB-297.
March 7, 1955

Decision and Order[a]

1. The Section 8(b)(2) allegations of the complaint

We agree with the Trial Examiner's finding that the Union violated Sections 8(b)(2) and 8(b)(1)(A) of the Act by causing the Company to discharge employees Taylor, Hall, Salisbury, Pieha, and Bellendir for reasons other than their failure to tender periodic dues uniformly required as a condition of retaining membership in the Union.

As described in the Intermediate Report, the union constitution and rules provided that if a member became 3 months delinquent in the payment of dues, he was automatically dropped from membership. . . . Testimony credited by the Trial Examiner established that on September 28, 1953, before they would have become 3 months delinquent in their dues, Taylor and Hall went to the union office and made a personal tender of their dues for the previous months, which Business Agent Wilke refused to accept, stating that they could not pay their dues unless they also paid the assessment.[3] The Union contends that

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[a] Petitioner has not copied those portions of the Decision and Order relating to Peerless Tool and Engineering Company and findings as to form. They are contained in the record, pages 376-390. The *numbered* footnotes following are from the decision; this one was supplied by Petitioner.

[3] We do not adopt the Trial Examiner's statement that it had been a "long established practice" for the union stewards to collect dues at the plant, as the evidence relating to such a practice is inconclusive. This does not, however, affect our agreement with the Trial Examiner's ultimate conclusion. Like the Trial Exam-

even if this incident occurred, subsequent requests by Union Steward Brasfield that Taylor and Hall pay only their dues made it incumbent upon them to make further tender of dues, and that failure to do so make them legally subject to discharge. However, the record does not establish that such a request was made. According to Brasfield, his subsequent conversations with Taylor and Hall and other delinquent members were limited to statements that they were delinquent in their dues, and that if they were 3 months delinquent, they would be subject to discharge. This hardly constitutes an offer that the Union would accept dues without the condition which it previously attached. In the absence of such an offer being communicated to Taylor and Hall, they were not required to make recurring futile tender in the face of Wilke's explicit rejection on September 28.

We turn next to the facts relating to the alleged dues delinquencies of Salisbury, Picha, and Bellendir. The last month for which Salisbury paid his dues was March 1953. He made no tender of dues to the Union during the months of April, May, and June, 1953, and his membership automatically terminated at the end of June under the Union's 3-month rule. In September and November he indicated to Steward Brasfield that he would pay his dues but not the assessment. In the November conversation, Brasfield replied that Salisbury could not pay his dues without paying the assessment.

On June 22, 1953, Picha succeeded in paying his dues for the month of May at the Union office, after protesting that he was unable also to pay the assessment. At that time, he was informed by the union clerk who accepted his dues that "they [the Union] wouldn't take the next payment unless he paid the assessment." Picha subsequently

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iner, we find that the alleged "donation" was in fact treated as an assessment by the Union. Although it did not technically qualify as such, the Union itself so referred to it, and clearly considered it mandatory for the members to contribute.

heard from other employes that dues were being refused in this manner. He nade no tender of dues for the months of June, July, and August, and therefore, according to the union rules, his membership was terminated at the end of the month of August. He offered to pay Brasfield in November. Brasfeld replied merely that "It is out of my hands."

In May 1953, Bellendir paid his dues through the month of July. He testifiec that he was "pressured" to pay the assessment at that time, but that he was permitted to pay his dues only after he explained that he was unable to pay the assessment. On October 28, 1953, a few days before he would have become 3 months delinquent in his dues, and therefore no longer a member in good standing, Bellendir mailed the Union $4, the exact amount of his dues for August, together with his dues book. A few days later, he received in the mail a receipt for a $4 "donation," dated October 29, and his dues book without an August dues stamp. A few days after November 1, Bellendir spoke to Brasfield about the $4 being applied to the assessment, instead of to his dues. Brasfield told him he would have to go to the union office to have it changed. Bellendir asserts that he did not go to the union office because he knew that on the union records he was already 3 months in arrears and he hought it was too late for him to do anything about it.

The Trial Examiner found that each of the discharged employees made a ender of dues on at least one occasion, and tender was eitler refused by the Union, or the money was misapplied to the assessment, and subsequent tender was excused as futle because the Union had a policy that payment of the assessment was a condition precedent to the acceptance of dues payment. However, it is undisputed that, as relted above, Salisbury and Pieha made no tender of dues luring the 3 months following their last dues payment, whih was the time allotted for tender under the Union's autonatic termination of membership rule.

In determining whether the Union could thereafter legally cause their discharge, it is therefore necessary to determine whether their failure to make a tender during this period was excused.

We agree with the Trial Examiner's finding that the Union had a policy of refusing to accept dues unless the assessment for the strike fund was also paid. The existence of such a policy is shown by the statement by an employee of the Union to Pieha that his next dues payment would not be accepted unless he also paid the assessment; by Wilke's rejection of tenders of dues on September 28 by Taylor, Hall, and Cantrell, because the assessment was not paid; and by the statements of Union Steward Brasfield at the plant to employees Hall, Cantrell, Salisbury, and Pieha in September and November, that dues would not be accepted unless the assessment was paid. We also find that the misapplication of dues money mailed to the Union by Hoppe on August 26, and by Bellendir on October 28, as fully described in the Intermediate Report, resulted from the application of the above policy.[4]

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[4] The Trial Examiner found that although these misapplications were indicative of the Union's policy not to accept dues without the assessment, they appeared to be the result of errors. We do not adopt the latter conclusion, which is inconsistent with the finding that they were indicative of a policy, and also with the Trial Examiner's characterization of the Union's explanation of its handling of Hoppe's remittances as unconvincing. However, as there is no exception to the recommendation to dismiss the portion of the complaint relating to these incidents, we adopt this recommendation pro forma.

The Union excepts to the receipt in evidence of certain carbon copies of letters from Hoppe to the Union requesting that the misapplication of his dues money be corrected, on the ground that the best evidence rule requires the introduction of the original letters unless the General Counsel could not have secured the originals from the Union by subpena. The letters were admitted subject to substitution of the originals if the Union would consent to produce them. In these circumstances we find that the Respondent Union was not prejudiced by receipt of the copies in evidence.

This policy of the Union not to accept dues without payment of the assessment was in effect during at least a portion of the 3-month period ending June 30, 1953, in which Salisbury was otherwise required to tender his dues to avoid termination of his membership. The letter announcing the assessment for the strike fund was issued by the Union to the membership on May 18, 1953. By June 22, 1953, the fact that the Union would not accept dues unless accompanied by payment of the assessment was openly expressed by a union clerk charged with the acceptance of dues from the members. That this statement was in fact an accurate statement of the Union's policy in this respect, is borne out by the subsequent application of the policy in Wilke's refusal to accept the dues of employees, and by its reiteration on several occasions by Union Steward Brasfield. The substance of the union policy is the controlling factor in determining whether tender would have been futile. Because of the existence of the union policy during the latter portion of the period during which Salisbury could have made a timely tender of dues, we are convinced that such a tender by him in fact became a futile gesture before his grace period expired. As regards Pieha, we find that tender of his dues during the months of July and August would have been futile in view of the prior statement to him that his next dues payment would not be accepted unless accompanied by the assessment, and the fact that this was indeed the union policy during this period.

As previously indicated, Bellendir's last tender of dues was in fact timely with respect to the Union's automatic suspension rule, but the money was misapplied by crediting it to the assessment. The Union contends that it was incumbent on Bellendir to have the misapplication rectified, and to continue to tender his dues thereafter. We find that the misapplication was in fact an indication of the futility of tender which indeed existed under the Union's policy not to accept dues unless the assessment was paid,

and therefore Ballendir was not required to make further tender. In the circumstances related, the failure of Salisbury, Pieha, and Bellendir to tender dues during their respective 3-month grace periods is immaterial.[5]

2. The Section 8(b)(1)(A allegations of the complaint

The Trial Examiner found that the Union violated Section 8(b)(1)(A) of the Act by threatening that it would not process grievances for employees who failed to pay an assessment to the union strike fund. We find in agreement with the Trial Examiner and contrary to the Union's contentions, that the threats were made on the occasions found by the Trial Examiner.[6] The Union also contends that even if the threats were made, threats of this nature do not constitute a violation of Section 8(b)(1)(A) because they are not coercive of employees in the exercise of the rights guaranteed in Section 7 of the Act. Section 7 of the Act guarantees to employees the right to engage in union activities, and also the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment by the tender of periodic dues and initiation fees uniformly required, as authorized in Section 8(a)(3) of the Act. The Board has previously noted that denial to employees of so valuable a facility as the Union's assistance in prosecuting

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[5] *Eclipse Lumber Co. Inc.*, 5 NLRB 464, 467, enfd. 199 F. 2d 684 (C. A. 9); *Westinghouse Electric Corporation*, 96 NLRB 522, enfd. 203 F. 2d 173 (C. A. 9)

[6] As we find that the record supports the Trial Examiner's factual finding that Union Steward Chmielak made the threats in question after September 1, 153, and continued to reiterate them at least during October and November 1953, and therefore within the Section 10(b) period, we find this Section 8(b)(1)(A) allegation was not barred by Section 10(b), as contended by the Respondent Union.

grievances is a grave matter,[7] and clearly therefore, a threat to do so is coercive in nature.

It is true, as the Union contends, that an employee who is a union member and who refuses to comply with requirements of the union to perform additional obligations or activities is not immune from all forms of compulsion by the union. Under the proviso to Section 8(b)(1)(A) which reserves to labor organizations the right to prescribe rules regarding membership, sanctions such as fines,[8] or even expulsion from union membership[9] may be imposed to secure compliance with a union's rules and requirements, for although these measures are in fact coercive, they are permissible under the proviso as matters confined to internal union administration. However, a threat not to represent an employee in the processing of his grievances is clearly not limited to internal union administration. The union enjoys its position as exclusive representative of the employees by virtue of Section 9(a) of the Act, which provides in part that:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . .

The Board has held that an organization which is granted exclusive bargaining rights under Section 9 has, in return, assumed the responsibility to act as a genuine representative of all the employees in the bargaining unit, and, more specifically, that Section 9(a) gives rise to a duty by such a labor organization impartially and with-

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[7] *Hughes Tool Company*, 104 NLRB 318, pp. 326-328. threat to do so is coercive in nature.

[8] *Minneapolis Star and Tribune Company*, 109 NLRB 727.

[9] *International Typographical Union, et al.* (American Newspaper Publishers Assn.), 86 NLRB 951.

out discrimination to accept and process all grievances on which its aid is requested by the employees it represents.[10] This duty of the bargaining representative to the employees and the corresponding right of the employees to have this bargaining representative undertake to perform the duty arise from the fact that the employees are in the bargaining unit, irrespective of union membership or the existence of a union-security contract. We find, in agreement with the Trial Examiner, that the threats to discriminate in the performance of this duty, which the Union made here for the purpose of coercing employees to contribute to its strike fund, are threats of reprisal prohibited by Section 8(b)(1)(A) of the Act.

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[10] *See Hughes Tool Company, supra,* at p. 325.

APPENDIX B

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT.

March 6, 1956.

No. 11566.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

DIE AND TOOL MAKERS LODGE NO. 113,
INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

and

PEERLESS TOOL AND ENGINEERING COMPANY, *Respondents.*[b]

Rehearing Denied April 19, 1956.

Before MAJOR, LINDLEY and SWAIM, *Circuit Judges.*

This case is here on the National Labor Relations Board's petition to enforce its order issued against both respondents.

Respondent Die and Toolmakers Lodge 113, International Association of Machinists, A.F.L., is the sole bargaining representative for the employees of respondent Peerless Tool and Engineering Company. Section 2 of Article I of the collective bargaining agreement in effect between the Company and the Union provides that all employees who were on the date of the execution of the contract members of the Union shall remain members of the Union as a condition of employment and that all new employees shall within thirty-one days become and then

[b] Petitioner has not copied those portions of the opinion relating to the Company. They are contained in 231 F. 2d 298, pages 302-304.

remain members of the Union as a condition of employment. A rule of the Union provides that any member who fails to pay his dues for a period of three months automatically loses his membership.

Early in 1953 the Union sent the following letter to all of its members:

"Dear Sir and Brother:

"There will be a voluntary donation to support our striking Brothers in the following amounts:

"$10.00 weekly for those Journeyman working in shops with $2.73 contracts.

"5.00 weekly for all others.

"The first of such assessments is due May 22, 1953.

"You will receive a receipt for your donation and the amount will be recorded on the assessment pages of your dues book.

"This assessment will run as long as it is necessary to win our fight.

"Fraternally yours,

"Die & Tool Makers Lodge
"No. 113 I. A. of M.
"D. W. McDole
"Financial Secretary"

Even though the employees of Peerless Tool and Engineering Company were not on strike, they were required to contribute their weekly "donations" to the Union's strike fund.

In February of 1954 the Company notified the Union that it was going to have to lay off several employees and, pursuant to the collective bargaining agreement, listed those who were lowest in seniority as the men to be discharged. Thereupon the Union furnished the Company with a list of

seven employees who were more than three months delinquent in their dues and requested that the Company discharge these named employees rather than lay off Union members in good standing who had less seniority. The Company then discharged five of the seven men named by the Union.

Two of the men discharged filed a charge with the Board claiming that the Union refused to accept their dues because they would not pay the "donation," and that the Company knew this when it fired them. The General Counsel of the Board filed a consolidated complaint accusing both the Union and the Company of unfair labor practices.

In its decision and order the Board concluded that the Union had violated Sections 8(b)(2) and 8(b)(1)(A) of the Labor Management Relations Act, 29 U.S.C.A. § 158 (b)(2) and 158 (b)(1)(A), by causing the Company to discharge the five named employees for reasons other than failure to tender union dues; and that the Union had further violated Section 8(b)(1)(A) by threatening that it would not process grievances for employees who refused to pay the "donation." The Board found that the Company had violated Sections 8(a)(3) and (1), 29 U.S.C.A. § 158(a) (3) and (1), by discriminating in regard to tenure of employment of five named employees. In this enforcement proceeding each respondent has vigorously contested the portion of the decision and order that is directed against it.

The Union.

The Section 8(b)(2) Violation.

The Union admits that it violated Section 8(b)(2) if it refused a valid tender of dues thereby causing an employee's discharge for reasons other than nonpayment of dues. The Board argues that this is exactly what the Union did, so the principal question on review is the existence of substantial evidence to support the Board's findings.

In its decision and order the Board stated:

> "The Trial Examiner found that each of the discharged employees made a tender of dues on at least one occasion, and that tender was either refused by the Union, or the money was misapplied to the assessment, and subsequent tender was excused as futile because the Union had a policy that payment of the assessment was a condition precedent to the acceptance of dues payments."

The Union denies that the evidence shows a Union policy of conditioning the acceptance of dues upon payment of the "donation," and argues that the discharged employees had a duty to tender their dues each time they became due even if those for the previous month had been refused.

The first man to testify was Hall, one of the charging parties. He stated on direct examination that, with Taylor and Cantrell, he had gone to the Union office to pay his dues and had been refused. All three men had the amount of money they owed in their hands, but the Union officials refused to take it. Mr. Wilke, business representative of the Union, told them that the Union would not accept their dues until they paid the "assessment." Although Hall, Taylor and Cantrell were all excluded from the hearing room except when they themselves were testifying, they all gave substantially the same account of this occurrence. Wilke denied telling them that they would have to pay the "assessment" before their dues would be accepted, but the hearing examiner credited the three employees and the Board accepted his finding. There is substantial evidence in the record to support this finding.

The Union did not actually refuse to accept dues from the other three men named in the complaint as it had from Hall, Taylor and Cantrell. However, these three men (Salisbury, Pieha and Bellendir) met with resistance in the form of misapplication and delay, and were told that dues would not be accepted unless the assessment was paid.

Edward Salisbury testified that he sent ten dollars and his dues book to the Union office, and that his book was returned to him without credit for paying his dues. When Salisbury asked a Union steward about this, he was told that he would have to pay the assessment. When the steward told Salisbury that he was behind in his dues, Salisbury offered to pay his dues but said he would not pay the assessment. The steward told him that he could not pay his dues until he "straightened out the assessment along with it."

Joseph Pieha told the examiner that the people in charge of the Union office would not accept his dues without the "donation" until he told them that he had been sick for several weeks and was unable to pay it at that time. But he was told that the next time he paid his dues he would have to pay the assessment. Pieha also testified that he knew of other employees in his department, not involved in this proceeding, who were not able to pay their dues until they had paid the assessment. He did not attempt to pay his dues again.

James Bellendir is in much the same position as Pieha. Bellendir, too, testified that he was not allowed to pay his dues without the assessment until he told the Union officials that his wife had just returned from the hospital. The next time he tried to pay his dues the money was applied to the strike fund and he received no credit in his due book. Bellendir made no further attempt to pay his dues.

The trial examiner and the Board concluded from the evidence that it was the Union's policy not to accept dues until the required "donation" had been paid. They held that in the face of this policy plus the resistance to and, in some instances, outright rejection of tender, these men were not required to continue their attempts to force the Union to accept their dues.

(1) There is sufficient evidence in the record to support the Board's finding that it would have been useless for

these employees to continue attempting to pay their Union dues without first paying the "donation." They could reasonably have concluded that further tenders would also have been refused.

(2) The law is clearly against the Union's contention that these employees were obligated to continue tendering each month's dues as they became payable even though their last tender had been refused. N. L. R. B. v. International Ass'n of Machinists, Local No. 504, 9 Cir., 203 F. 2d 173, is a case much like the one before us. In that case an employee fell into disfavor with the respondent union because he organized and promoted a rival union. The respondent union fined him $500 and terminated his membership until the fine was paid. The employee refused to pay the fine. Shortly after this, the respondent union entered into a union shop agreement with the employer and asked that the employee be discharged because he had failed to pay his dues. In enforcing an unfair labor practice decree against the union, the Ninth Circuit held that the employee did not have to continue offering to pay his dues because he had been told by the steward that they would not be accepted. The court also gave weight to the fact that the employee had heard the steward say to another employee in the same circumstances, " 'You know I can't take dues from you guys.' " 203 F. 2d at page 175.

The present case is even stronger because two of the discharged employees actually went to the Union office with their dues money in their hands and were turned away, and because the Union's policy was demonstrated by many more incidents. The law does not require the performance of useless acts. The petitioner also cites several insurance cases in which it has been held that tender of premiums need not be made where it is reasonably certain that they will be refused. Taylor v. Mutual Ben. Health & Accident Ass'n, 8 Cir., 133 F. 2d 279; Shaner v. West Coast Life Ins. Co., 10 Cir., 73 F. 2d 681. The Board was justified in finding that it was reasonably certain that any tender of

dues from the five employees discussed above would have been refused.

The Section 8(b)(1)(A) Violation.

(3) The Board approved the hearing examiner's findings in concluding that the Union had tried to coerce the employees named in the complaint in the exercise of their rights under Section 7 of the Act. The coercive statements cited by the Board were those made by Union Steward Chmeilak to the effect that the Union would not prosecute grievances for employees who did not pay the assessment. There is evidence in the record to support the finding that Chmeilak actually did make these statements.

At page 112 of the Joint Appendix George Cantrell testified as follows:

> "Q. Would it be Tony Chmeilak? A. That is right.
> "Q. What did he say at that meeting? A. He said the ones that didn't pay the assessment, if they brought a grievance to him that he would tear it up and throw it in the garbage can."

At pages 139-140 of the Joint Appendix Andrew Barnes, an employee of Peerless and a Union member, testified:

> "A. The main thing I noticed he [Chmeilak] said, he said that if we didn't pay this assessment, not to bring any grievance, because if we did he would tear the grievance up and throw it in our face.
> "Q. Did Wilke [Union Business Representative] say anything at that meeting? A. Well, yes, he had quite a bit to say, but the main thing he said—he sat around the table like this, and he walked around the table, and as he walked around the table, he said, 'Well, this here assessment is voluntary. You don't have to pay it if you don't want to, but if you don't pay it, don't come to the union for anything because you most certainly will not get it'."

At page 177 of the Joint Appendix Charles Cerminn testified about Chmeilak:

> "A. He said they wouldn't look into any of my grievances unless I could show my book showing that I had a paid-up membership."

And again at page 191 Cerminn said:

> "A. There wasn't nothing said about not paying the assessment and taking up grievances. The only time the subject was discussed with Chmeilak was when we were told that he would not represent the men in the grievances if they didn't have their assessments paid."

(4) Chmeilak denied having made these statements, but the hearing examiner credited the employees and the Board accepted his finding. Of course, we cannot review these administrative determinations on the credibility of witnesses.

(5) All of these statements except the last two, which were related by Charles Cerminn, occurred before October 15, 1953, and cannot, therefore, be cited as unfair labor practices because they were made more than six months before the charge in which they were alleged. 29 U.S.C.A. § 160(b). They do, however, lend credibility to Cerminn's testimony relating threats by Chmeilak which the examiner and the Board found were made within the statutory period.

Cerminn was never very clear about just when the meeting took place at which he heard Chmeilak say that he would not prosecute grievances for those who did not pay the assessment. On direct examination Cerminn said that it was in the fall of 1953, but that he talked to Chmeilak about the assessment almost every day. Although he specifically said that it could have been in September, October or November, he later stated that he attended the meeting "much later" than writing a check to the Union which was dated September 14, 1953. At another point in his testimony

Cerminn described he meeting as being in the "late fall." We feel that these statements, plus the fact that Cerminn and Chmeilak were constantly discussing this subject throughout the latter part of 1953 and the first part of 1954, furnished sufficient evidence to support the Board's finding that Chmeilak made at least one of these threats after October 15, 1953.

Such a threat is violative of Section 8(b)(1)(A) of the Act, 29 U.S.C.A. §158(b)(1)(A), because, in the terms of the statute, it tends " * * * to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *." Section 7 gives employees the right to engage in concerted activities for their mutual aid or protection, and the right to refrain from such activities. The employees of Peerless, therefore, had the right to refrain from paying the "donation." Threatening to stop processing grievances for employees who did not pay the proper "donation" was coercive within the meaning of Section 8(b)(1)(A). It was not simply internal administration of Union affairs because as the certified bargaining representative, the Union is required by the Act to represent and bargain for *all* of the employees in the plant. Ford Motor Co. v. Huffman, 345 U.S. 330, 337, 73 S. Ct. 681, 686, 97 L. Ed. 1048, where the Court said that the unions' "statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any."

Following the recommendation of the Trial Examiner, the Board ordered the Union and the Company to cease and desist from the unfair labor practices, ordered the Company to notify the five men in writing that Union had withdrawn its objections to their employment and requested their immediate and full reinstatement, and ordered the Union and the Company jointly and severally to make whole each of the five employees for any loss of pay suffered by reason of the discrimination. Neither the Union

nor the Company makes any complaint in this court of that provision of the Board's order which requires that the discharged employees be made whole by the Union and the Company jointly and severally. Each, instead, is complaining only that the evidence was not sufficient to sustain the Board's finding of unfair labor practices as charged.

Since we have shown above that the evidence was sufficient, the order of the Board must be enforced. It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Filed May 9, 1956 Kenneth J. Carrick Clerk

No. 11566

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

DIE AND TOOLMAKERS LODGE No. 113, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL; and PEERLESS TOOL AND ENGINEERING CO., *Respondents*.

Decree Enforcing an Order of the National Labor Relations Board

Before: MAJOR, LINDLEY and SWAIM, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated March 7, 1955. The Court heard argument of respective counsel on January 26, 1956, and has considered the brief and the transcript of record filed in this cause. On March 6, 1956, the Court, being fully advised in the premises handed down its decision enforcing the said order. In conformity therewith it is hereby

ORDERED, ADJUDGED AND DECREED that:

I. The Respondent, Die and Toolmakers Lodge No. 113, International Association of Machinists, AFL, Chicago, Illinois, (hereinafter called Respondent Union), its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Peerless Tool and Engineering Co., its officers, agents, successors, and assigns, to discharge or in any other manner to discriminate against its employees with respect to whom membership in the Respondent Union has been denied or terminated upon some ground other than failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership or to discharge or in any other manner to discriminate against its employees in violation of Section 8 (a) (3) of the National Labor Relations Act, as amended (hereinafter called the Act).

(b) Restraining or coercing employees of Peerless Tool and Engineering Co., its officers, agents, successors, and assigns, in the exercise of their right to engage in or to refrain from engaging in any and all of the concerted activities guaranteed to them by Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(a) Notify Peerless Tool and Engineering Co. in writing that it withdraws its objections to the employment of Lowell Hall, Marlin Taylor, Joseph Pieha, Edward Salisbury, and James Bellendir, and requests it to offer them immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Notify Lowell Hall, Marlin Taylor, Joseph Pieha, Edward Salisbury, and James Bellendir in writing that it had advised Peerless Tool and Engineering Co. that it withdraws its objections to their employment and requests it to offer them immediate and full reinstatement.

(c) Make whole Lowell Hall, Marlin Taylor, Joseph Pieha, Edward Salisbury, and James Bellendir for any loss of pay they may have suffered as a result of the discrimination against them in the manner set forth in the section of the Intermediate Report of the Trial Examiner of the National Labor Relations Board dated August 25, 1954, entitled "The Remedy."

(d) Post in conspicuous places in its business office at Chicago, Illinois, where notices are customarily posted, copies of the notice attached hereto marked "Appendix A". Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region of the National Labor Relations Board, Chicago, Illinois, shall, after being duly signed by the Respondent Union's official representative, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that such notices are not altered, defaced, or covered by any other material.

(e) Mail to the aforesaid Regional Director signed copies of the notice attached hereto and marked "Appendix A" for posting, the Employer willing, at its plant in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the said Regional Director, shall, after being signed by the Respondent Union's official representatives, be forthwith returned to the Regional Director for said posting.

(f) Notify the aforesaid Regional Director in writing within ten (10) days from the date of this Decree what steps it has taken to comply herewith.

J. Earl Major
Judge, United States Court of Appeals for Seventh Circuit

Walter C. Lindley
Judge, United States Court of Appeals for the Seventh Circuit

H. Nathan Swaim
Judge, United States Court of Appeals for the Seventh Circuit

A True Copy:

Teste:

Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit
(Seal)

Dated: May 9, 1956

APPENDIX A

Notice to All Members of Die and Tool Makers Lodge No. 113, International Association of Machinists, AFL

Pursuant to a Decree of the United States Court of Appeals, enforcing an Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT cause or attempt to cause Peerless Tool and Engineering Co. or any other employer to discriminate in any manner against employees in violation of Section 8 (a) (3).

WE WILL accept the payment of dues from members without requiring that they also pay a donation to the strike fund.

WE WILL NOT in any manner restrain or coerce employees of the above-named or any other employer in the exercise of rights under Section 7 of the Act.

WE WILL make Lowell Hall, Marlin Taylor, Joseph Pieha, Edward Salisbury and James Bellendir whole for the discrimination caused against them.

WE HAVE withdrawn our request for the discharge of the aforementioned individuals and have notified Peerless Tool and Engineering Co. that we have no objection their reemployment.

DIE AND TOOL MAKERS LODGE NO. 113, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL

.....
(Labor Organization)

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced or covered by any other material.

APPENDIX C

Statutes Involved

Administrative Procedures Act

5 USCA 1001 et seq.

5 USCA 1009(e)—Scope of Review

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. Act of June 11, 1946, C. 324 § 10, 60 Stat. 243.

Judicial Code

28 USCA 1 et seq.

28 USCA 1254. Courts of Appeals; Certiorari; Appeal; Certified Questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . Act of June 25, 1948, C. 646, 62 Stat. 928.

National Labor Relations Act

29 USCA 151 et seq.

29 USCA 158—Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159(f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify an discrimination against an employee for non-membership in a labor organization (A) if he has rea-

sonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership. (Act of July, 1935, c. 372, § 8, 49 Stat. 452; as amended June, 1947, c. 120, Title I, § 101, 61 Stat. 140; October 22, 1951, c. 534, § 1(b), 65 Stat. 601).

158—Unfair Labor Practices

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce

(A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. (Act June 23, 1947, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601).

29 USCA 160—Prevention of Unfair Labor Practices—Powers of Board Generally

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable.

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the

Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon . . .

(c) Reduction of testimony to writing; findings and orders of Board.

. . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the per-

son named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . .

(e) Petition to court for enforcement of order; proceedings; review of judgment.

The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit of district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure

or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28. (Act June 7, 1934, c. 426, 48 Stat. 926; July 5, 1935, c. 372, § 10, 49 Stat. 453; June 25, 1936, c. 804, 49 Stat. 1921; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 146; June 25, 1948, c. 648, § 32, 62 Stat. 991).

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 191

DIE AND TOOLMAKERS LODGE 113, INTERNATIONAL ASSOCIATION OF MACHINISTS (AFL-CIO), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. 9a-18a) is reported at 231 F. 2d 298. The findings of fact, conclusions of law, and order of the Board (J. A. 339-390)[1] are reported at 111 NLRB 853.

JURISDICTION

The decree of the court below was entered on May 9, 1956 (Pet. App. 18a-22a). The petition for a writ of

[1] "J.A." refers to the Joint Appendix filed in the court below.

certiorari was filed on June 22, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Petitioner union, after refusing to accept dues from employees who failed to pay a strike assessment, obtained the discharge of several such employees under a union-security agreement for nonpayment of dues. The first question presented is whether the employees were required to make a futile tender of dues in order to retain their statutory protection against discharge for nonpayment.

2. Whether substantial evidence supports the finding of the Board, sustained by the court below, that petitioner's admitted acts of unlawful restraint and coercion were committed within six months preceding the filing of the charge.

STATUTE INVOLVED

Section 7 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

The other relevant statutory provisions are set forth in the Petition, 23a-28a.

STATEMENT

I. The Board's Findings of Fact

Briefly, the Board found that petitioner, herein sometimes referred to as the Union, violated Section 8 (b) (2) and (1) (A) of the Act by causing Peerless Tool and Engineering Company, herein called the Company, to discharge five employees for alleged dues delinquencies which occurred solely because petitioner refused to accept the employees' tender of dues unless they also contributed to its strike fund.[2] The Board also found that petitioner had further violated Section 8 (b) (1) (A) by its threat not to process grievances for employee-members who failed to contribute to its strike fund.

A. *Petitioner levies a strike fund assessment, and threatens employees who refuse to pay*

In the spring of 1953, as the result of strikes against several employers not including the Company, petitioner in an effort to replenish its strike-fund levied an assessment of $5 to $10 per week on each member (J. A. 344; 244, 262, 264, 289, 335-336). In June 1953, in explaining the assessment to the union members employed by the Company, petitioner's shop steward Chmeilak stated that those who did not pay the assessment need not bring any grievances to him because if they did "he would tear it up and throw it in the garbage can" (J. A. 345; 86, 111-112, 222-223, 290). At the same

[2] Petitioner on this review appears to concede the validity of the Board's determination with respect to two employees. Pet. 3, n. 2.

meeting Business Agent Wilke stated that the assessment was "voluntary," but "if you don't pay it, don't come to the Union for anything because you most certainly will not get it" (J. A. 345; 139-140). Both Chmeilak and Wilke in addressing the employees called to their attention the fact that, if they became three months' delinquent in the payment of their dues, they would automatically be dropped from membership under the Union's constitution, and that under the union shop agreement with the Company, such employees would be subject to discharge at petitioner's request (J. A. 345; 213-214, 245-246, 253, 26, 28, 42).

As appears more fully below, petitioner sought to compel payments to the strike fund by refusing to accept dues from employees who were "delinquent" with respect to the assessment. Thereafter, in October and November 1953, shop steward Chmeilak reiterated his earlier threat to coerce the employees into paying the assessment (J. A. 346-347; 177, 190-191). On one occasion Chmeilak stated to employee Cerminn that the Union would not process grievances for members who refused to contribute to the strike fund, and on another occasion, Chmeilak said that he would only process grievances for members who had Union dues books showing a paid-up membership (J. A. 346-347; 177, 190-191).

B. *Petitioner refuses to accept dues from employees who have not paid the assessment, and applies to the assessment payments intended for dues*

1. Hall, Taylor and Cantrell

In September 1953 employees Lowell Hall, Marlin Taylor, and George Cantrell, who were opposed to the

strike fund assessment and had made no payments to it, visited the Union office together to make dues payments (J. A. 377, 348-349; 87-89, 97, 101-102, 106-107, 113-115). When the three men tendered their books and dues to the Union cashier, she noted that none of them had paid the assessment and called Business Agent Wilke (J. A. 348; 88-89, 102, 114-115). When the men indicated to Wilke that they would not pay the assessment, he replied that he was sorry but they could not pay their dues unless they did so (J. A. 377, 349; 89-90, 102-103, 115-116). Wilke further stated that if an employee did not pay the assessment he would be forced out of the Union and lose his job (J. A. 349; 90). When Taylor expressly asked Wilke if he was refusing to accept their tender of dues, Wilke acknowledged that he was (J. A. 349; 103). Later that day Union Steward Brasfield told them they "might just as well pay it. There is no way around it or out of it" (J. A. 349; 90-91, 116-117). At a later date Brasfield again affirmed to Hall that the Union "will not take your dues until you pay [the assessment]" (J. A. 349; 91). Taylor, Hall, and Cantrell made no further tender of dues prior to the time the three month grace period afforded them under the Union's constitution expired or before the demand for their discharge made by the Union several months later (J. A. 351; 87, 107, 113).

2. Pieha

When employee Joseph Pieha visited the Union office on June 22 to pay his membership dues for May, the Union cashier took the money proffered by Pieha and started to credit it as his contribution to the strike fund which Pieha had not paid (J. A. 378-352; 154, 158).

Pieha thereupon protested that he had been ill for a few weeks (J. A. 378, 352; 154, 158). The cashier, after consulting with some third person in the Union office about the matter, thereafter noted in Pieha's dues book that he would be excused from paying the assessment for the period of his illness, and accepted the proffered money as Pieha's dues payment for May 1953 (J. A. 378, 352; 154-155, 158, 276, 79). At this time, however, the cashier told Pieha that the Union would not accept any more dues unless the assessments were paid (J. A. 378, 352; 155, 158). Because of this announced Union policy, and because of other incidents apparently resulting from such a policy which were told to him, Pieha made no tender of dues to the Union for the months of June, July, and August, and according to the Union's rules his membership terminated at the end of August 1953 (J. A. 378-379; 155, 158-159, 160).

3. Bellendir

In May 1953, when James Bellendir, an employee of the Company and member of the Union, attempted to pay two months' dues, the Union cashier, noting from Bellendir's dues book that no payment had been made to the strike fund, attempted to "pressure" Bellendir into making such a payment (J. A. 353; 161). When Bellendir complained that his wife had recently been hospitalized, the cashier, after discussing Bellendir's case with an unidentified person in the office, accepted Bellendir's proffered dues payments, and stamped his dues book as paid (J. A. 353; 161-162).

In the latter part of October Bellendir mailed the Union his dues book, together with a money order for $4.00, the exact amount of his dues for August 1953 (J. A. 379, 353; 276, 162-163, 168). A few days later

his Union dues book was returned to him without an August dues stamp but containing a notation in the assessment section that four $5 assessments had been levied against him on May 22, 29, June 5 and 12, 1953, together with a credit of $4 on the first of these assessments, which was marked as paid on October 29, 1953 (J. A. 379, 353; 163-164, 44). Also enclosed was a receipt dated October 29, 1953, showing a $4 payment to the Union and credited to "donation" (J. A. 379, 353; 163, 44). On the receipt were notations: "4 wks. at $5 per week" and "bal. of $16 due yet" (J. A. 353; G. C. Ex. 9). Early in the month of November, when Bellendir spoke to Steward Brasfield about the application of this $4 payment to the assessment, instead of to his dues as he had intended, Brasfield told him that he would have to go down to the Union office to have it changed (J. A. 379, 353-354; 164, 166).[3] Bellendir, however, did nothing further in the matter for the reason that he knew that on the Union records he was already three months in arrears and he thought it was too late for him to do anything about it (J. A. 379, 354; 164, 166).

4. Salisbury

During the fall of 1953, Steward Brasfield also advised employee Edward C. Salisbury that the Union would not accept dues from employees who failed to make the required payments to the strike fund (J. A. 378, 351; 148-150). In September 1953, when Steward Brasfield inquired of Salisbury about his delinquent dues, Salisbury stated that he would pay his dues but

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would not pay the assessment (J. A. 378, 351; 148-149). Brasfield then replied that the assessment would have to be paid (J. A. 351; 149). Salisbury told Brasfield that if he was unable to pay his dues without the assessment he would not pay his dues (J. A. 351; 149, 144). In a later conversation between Brasfield and Salisbury in November 1953, Salisbury again stated that he would be glad to pay his dues but would not pay the assessment (J. A. 378, 351; 149-150). Brasfield at that time replied that Salisbury could not pay his dues unless he straightened out the assessment along with his dues (J. A. 378, 351; 150). Salisbury made no further effort to pay his Union dues (J. A. 351; 149-150).

C. *The Union compels the discharge of employees who have not paid the assessment*

On February 5, 1954, the Company notified the Union that it intended to lay off certain named employees (J. A. 342; 304-305, 92). Three days later the Union wrote the Company requesting the discharge of the employees discussed above for the asserted reason that they were delinquent in their dues (J. A. 342-343; 83, 304-305, 313-314, 40).

At the end of the work day on February 10, the Company terminated the employment of all the employees whose discharge had been demanded by the Union, except Cantrell (J. A. 359; 92-93, 119, 150, 156, 164-165, 307). Shortly after informing the employees of their impending discharge on February 8, the Company's personnel director told Cantrell that the Union had agreed to let him stay in the job because he was the only man on the night shift experienced at the special job he was then doing at the plant, and that he should get "straightened out" with the Union (J. A. 359; 119,

133-135, 310). Accordingly, Cantrell visited the Union hall that same week to pay his dues and there spoke with some unidentified person who indicated to him that the Union still would not accept his dues unless his strike-fund assessment was paid (J. A. 359; 120). Some days later when Cantrell again attempted to pay his dues, and offered to make weekly payments on the assessment, the Union's financial secretary told him, "No, pay the assessment and pay your dues as well as you can. I won't be hard on you." Cantrell then assented to the application of his $15 payment to the assessment and was not discharged (J. A. 359, 360; 119-120, 122, 330-331).

II. The Board's Conclusions of Law and Order

On the basis of the foregoing facts the Board found (1) that the Union had refused the timely tender of dues by Taylor and Hall because they had not paid the strike-fund assessment, and (2) that because the Union required the payment of the strike-fund assessment as a condition precedent to the acceptance of dues, Pieha, Salisbury, and Bellendir, all of whom refused to pay the assessment, were excused from the futile act of tendering dues. The Board concluded that the Union, by causing the Company to discharge these employees, had violated Section 8 (b) (2) and (1) (A) of the Act.[4] The Board further found that the Union had restrained and coerced the employees of the Company in violation of Section 8 (b) (1) (A) of the Act by its threat not to process grievances for employees who did not pay the strike-fund assessment (J. A. 377-384).

[4] The Board further found that the Company had unlawfully discharged the employees in violation of Section 8 (a) (3) and (1) and entered an appropriate order against the Company (J.A. 384-385, 388-390, 368-369). The Company has not sought review of this aspect of the case.

The Board's order (J. A. 385-390) requires the Union to cease and desist from causing the Company to discharge or otherwise discriminate against its employees in violation of Section 8 (a) (3) of the Act, and from restraining and coercing the Company's employees in the exercise of the rights guaranteed them under Section 7 of the Act.

Affirmatively the Board's order directs the Union (1) to notify the Company that the Union withdraws its objection to the employment of the five discharged employees, and requests their immediate reinstatement; (2) to notify the five employees that it has taken this action; (3) jointly and severally with the Company to make the employees whole for any loss they may have suffered because of the discrimination against them; and (4) to post appropriate notices (J. A. 386-388, 368-369).

III. The Decision of the Court Below

The court below, upon reviewing the evidence, sustained the Board's finding that "it would have been useless for these employees to continue attempting to pay their Union dues without first paying the 'donation.' They could reasonably have concluded that further tenders would also have been refused" (Pet. App. 13a-14a). Accordingly, the court below sustained the conclusion of the Board that the Union had caused the discharge of the employees "for reasons other than nonpayment of dues" (Pet. App. 11a, 14a). The court further sustained the Board's finding that sometime after October 15, 1953,[5] petitioner acting through shop steward Chmeilak violated Section 8 (b) (1) (A) by

[5] The charge was filed April 15, 1954; accordingly, violations of the Act committed prior to October 15, 1953, are barred by the limitations proviso of Section 10 (b).

threatening not to represent an employee in a grievance matter if he had not paid his strike assessment (Pet. App. 16a-17a). The court below accordingly enforced the order of the Board (Pet. App. 18a).

ARGUMENT

1. Under Section 8 (a) (3) and 8 (b) (2) an employee, even when subject to a union security agreement, is protected against discharge for loss of union membership if such loss of membership is not occasioned by a failure to tender dues (Pet. App. 25a.)[6] The holding of the court below that the same statutory protection extends to employees whose tender of dues would have been futile, because "the law does not require the performance of useless acts" (Pet. App. 14a), is manifestly correct, accords with the holdings of other courts of appeals,[7] and presents no question warranting review. Petitioner apparently no longer challenges the sufficiency of the evidence in support of the Board's finding that tender of dues without payment of the

[6] Petitioner does not challenge the Board's settled rule that a special strike assessment is not "dues," so that employees cannot be discharged for failure to pay such an assessment. *International Harvester Co.*, 95 NLRB 730, 732-733; *Lever Bros.*, 97 NLRB 1240; *Continental Can Co.*, 98 NLRB 1252; *National Malleable and Steel Castings Co.*, 99 NLRB 737; *John Deere Planter Works of Deere and Co.*, 107 NLRB 1497.

[7] *National Labor Relations Board* v. *International Association of Machinists*, 203 F. 2d 173, 176 (C.A. 9); *National Labor Relations Board* v. *Murphy's Motor Freight*, 231 F. 2d 654 (C.A. 3); see also *Hills* v. *Exchange Bank*, 105 U.S. 319, 321; *Taylor* v. *Mutual Ben. Assn.*, 133 F. 2d 279, 282-283 (C.A. 8); *Shaner* v. *West Coast Life Ins. Co.*, 73 F. 2d 681, 684-685 (C.A. 10). Petitioner's claim of conflict between the ruling below and *National Labor Relations Board* v. *Department Store Union*, 216 F. 2d 285 (C.A. 2) is insubstantial. The Second Circuit in the cited case expressly recognized that an employee is not required to make a useless tender of dues but found that the record in that case did not support a finding that such a tender would have been futile, 216 F. 2d, at 288, n. 1.

assessment would have been futile; the evidence (*supra*, pp. 4-8) fully supports the finding, and in any event the issue of fact thus posed would not warrant review. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502-503.

2. Apparently conceding that it violated Section 8 (b) (1) (A) by threatening not to represent in grievances employees who withheld the assessment, petitioner argues (Pet. 14-15) that this threat was not repeated within six months of the filing of the charge, and that the threat uttered within that period was "an entirely different one"—namely not to represent employees who did not have a paid-up dues status. The two allegedly "different" threats were in fact identical, as failure to pay the assessment prevented an employee from having a paid-up dues book. The court below with ample evidentiary support sustained the Board's finding that at least one such threat was made within the six-month period (Pet. App. 16a), and the question thus has no significance beyond the facts of this case. *General Pictures Co.* v. *Western Electric Co.*, 304 U. S. 175, 178.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully,

OSCAR H. DAVIS,
Acting Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
FREDERICK U. REEL,
MYRON S. WAKS,
Attorneys,
National Labor Relations Board.

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No. 161

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

DIE AND TOOLMAKERS LODGE 113
INTERNATIONAL ASSOCIATION OF MACHINISTS
(AFL-CIO), *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

PLATO E. PAPPS
GEO. W. CHRISTENSEN
1300 Connecticut Ave., N. W.
Washington 6, D. C.
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The Board (quite properly, from its point of view) argues certiorari should be denied in this cause because only its determinations of questions of fact are involved, which this Court does not, and should not, review.

The Board thereby persists in its determined effort to avoid joining issue with the Petitioner to resolve several important questions of law and construction of the statute involved in this case, primarily, whether

a union security agreement admittedly valid under the first proviso of Section 8(a)(3) of the Act constitutes a good and sufficient defense to a charge of violation of Section 8(b)(2) of the Act, where it is conceded the employee whose discharge precipitated the charge lost his union membership during the term of the agreement by virtue of his entire failure to make an affirmative and timely tender of dues.

The Board (again quite properly from its point of view) omits citation of its findings, and the evidence, concerning the dischargees' loss of *union membership,* concentrating instead on several secondary motivations (besides the non-membership motivation) the Union allegedly had for desiring their discharges.

To correct these omissions and to more fully inform the Court concerning the facts germane to the major question of law and statutory construction raised by the Petition and set out above, the following is submitted:

1. Edward Salisbury

Repondent limits its statement in regards Salisbury to an alleged offer to make a tender of dues by Salisbury in *September and November of 1953* (Opp. Brief, p. 7). This, however, is not the period with which we are here concerned, inasmuch as Edward Salisbury's union membership automatically terminated on *June 30, 1953.* To employ the Board's words:

> "The last month for which Salisbury paid his dues was March, 1953. He made no tender of dues to the Union during the months of April, May and June, 1953, and his membership automatically terminated at the end of June under the Union's 3-month rule." (Petition, p. 2a).

The Board's discussion of the alleged "futility" of a dues tender by Salisbury prior to June 30, 1953 is patently irrelevant, inasmuch as there is neither evidence of record that, prior to June 30, 1953, Salisbury had any notice from the Union, either directly or indirectly, to the effect that his tender of dues unaccompanied by a strike fund donation would be refused, nor any evidence of record that, prior to June 30, 1953, Salisbury had knowledge of any Union act or statement which could reasonably have caused him to believe that, were he to make a tender of dues unaccompanied by a strike fund donation to the Union prior to June 30, 1953, the Union would have refused it.

Under these circumstances a conclusion that a timely (Prior to June 30, 1953) dues tender by Salisbury would have been refused by the Union is pure speculation.

2. James Bellendir

While Bellendir's case is complicated by a misunderstanding over the application of a money order mailed to the Union's business office on October 28, 1953, his loss of Union membership because of his failure to tender dues is clear and undisputed.

Bellendir personally appeared at the Union's business offices in the latter part of May, 1953, and paid his dues for the months of May and June, 1953 (R. 162). At a time undisclosed by the record, but clearly falling between May and October, 1953, Bellendir mailed his July, 1953 dues to the Union's business offices, where the payment was duly recorded and receipt acknowledged (R. 162).

On or about October 28, 1953, Bellendir again (belatedly) mailed his August 1953 dues to the Union's business offices (R. 162). Due to the extremely heavy volume of mail receipts at the Union's business offices, of both dues payments and strike fund contributions, a shortage of clerical personnel, and no designation by the sender of the purpose for which the money order was intended, it was credited as a donation to the Union's strike fund and receipt therefor issued (R. 44; 168; 262; 265-266; 365). When Bellendir received his clearly-marked receipt to this effect, he contacted his Union Steward at the plant, who told him to call or contact the Union's business office and the mistake would be rectified (R. 166-167). Bellendir neither contacted the business office nor corrected the Steward's assumption that he would carry out the suggestion (R. 166-167). Neither did he pay any further dues (R. 164). The first knowledge the Union's business office had of the mistake came during the course of the processing of the charge before the Board, upon which notice the mistake was promptly rectified, just as all similar mistakes had been on notice thereof in the past (R. 70-74; 266; 268-272).

The record clearly and undisputedly demonstrates that Bellendir's membership was automatically terminated on the Union's records on October 31, 1953, by his failure to make a valid tender of his August, 1953 dues to the Union prior to that date. And even with credit for the mistaken October 28, 1953 payment, Bellendir's failure to make any further tender of his September, 1953 dues at any time prior to November 30, 1953 caused the automatic termination of his membership.

Again the Board's discussion of the alleged "futility" of a dues tender by Bellendir to the Union is irrelevant; the Union not only accepted every valid dues tender ever made by Bellendir prior to the October 28, 1953 tender of his August, 1953 dues, its steward gave him assurances the mistaken credit of that tender would be corrected on notice to the appropriate Union office, and the Board itself *dismissed* that section (Paragraph 8[b]) of its complaint charging that the Union *deliberately* misapplied the October 28, 1953 tender (R. 16; 24-25 [Paragraph 2]; 380 [Footnote 4, 3rd sentence]; 365).

3. Joseph Pieha

Pieha personally appeared at the Union's business offices on June 22, 1953 and paid his May, 1953 dues. He made no further tender of dues, and his membership terminated automatically on August 31, 1953. As the Board stated:

> "On June 22, 1953 Pieha succeeded in paying his dues for the month of May at the Union office . . . He made no tender of dues for the months of June, July and August, and therefore, according to the Union rules, his membership was terminated at the end of the month of August." (Petition, p. 2a-3a).

Once more the Board's discussion of the alleged 'futility' of a dues tender by Pieha to the Union prior to August 31, 1953 is irrelevant and speculative, inasmuch as the "futility" doctrine may only be invoked by one *whose affirmative tender has been refused.* Even crediting Pieha's self-serving testimony to the effect he was advised by the Union on June 22, 1953 that it would expect any further dues tenders from him to be

accompanied by a donation to the Union Strike Fund, Pieha's failure to make an affirmative tender of dues to find out whether such tender of dues without an accompanying donation would be refused or accepted bars application of the doctrine.

CONCLUSION

In view of the above and the material set out in our Petition for Writ of Certiorari to the United States Court of Appeals for the 7th Circuit, Petitioner respectfully requests that a Writ of Certiorari issue in the subject case.

PLATO E. PAPPS
GEO. W. CHRISTENSEN
1300 Connecticut Ave., N. W.
Washington 6, D. C.
Counsel for Petitioner